United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4263

United States Court of Appeals

FOR THE SECOND CIRCUIT

NIAGARA MOHAWK POWER CORPORATION,

Petitioner,

—v.—

FEDERAL POWER COMMISSION,

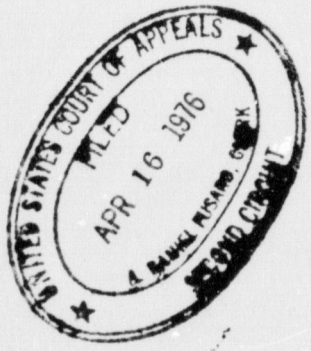
Respondent,

TOWN OF MASSENA, NEW YORK,

Intervenor.

B/P/S

REPLY BRIEF OF PETITIONER NIAGARA MOHAWK POWER CORPORATION



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REPLY BRIEF OF PETITIONER NIAGARA MOHAWK POWER CORPORATION

1. *Judicial Review of This Case Should Not Be Postponed*

The FPC asserts that review at this time by this Court is "premature" because the subject orders are "interlocutory" and not "sufficiently definitive" to be reviewable (FPC brief, p. 11). In this contention, the FPC ignores the fact that Niagara Mohawk raises a fundamental *jurisdictional* issue here.

Accordingly, Niagara Mohawk *and Massena* (Massena brief, Point III) both contend that review by this Court at the present time is proper. As Massena states at page 23 of its brief, "A hearing to determine the substantiability of the allegations [by Massena] of anti-competitive conduct

will not supply additional bases for jurisdiction and is not needed. The jurisdiction of the Commission must be present prior to any hearing on the merits of the allegations." Thus, *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375 (1938), cited by the FPC at pages 12-13 of its brief for the proposition that a full administrative hearing record is a necessary predicate for judicial review, is inapposite here.

Further, as the FPC concedes at page 14 of its brief, Section 313(b) of the Federal Power Act (the "Act"), 16 U.S.C. § 825*l*, does not limit review to "final orders" of the FPC. It provides, in relevant part:

> "Any party to a proceeding under this chapter aggrieved by *an order* issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals . . ." (Emphasis added.)

In *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir. 1972), *cert. den.* 409 U.S. 849 (1972), relied on by counsel for the FPC here (FPC brief, pp. 11, 14), this Court commented on Section 313(b) of the Act (455 F.2d at 425-26):

> "This language, unlike those provisions limiting review to 'final orders,' . . . seemingly would allow review of all Commission orders. But the courts, sensitive to the policies underlying the requirement of exhaustion of administrative remedies, have *declined* jurisdiction where the issues raised could be disposed of in review of a final Commission order *without serious detriment to the rights of the parties*. . . . In *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971), the District of Columbia Circuit, considering the Federal Insecticide, Fungicide, and Rodenticide Act, which provides for judicial review '[i]n a

> case of actual controversy as to the validity of any order' of the Secretary of Agriculture, stated that the applicable test is not whether there are further administrative procedeings available, but 'whether the impact of the order is sufficiently "final" to warrant review in the context of the particular case.'" (Citations omitted; emphasis added.)

The question before this Court, then, is to decide whether, in the context of *this* case, the Court should exercise its jurisdiction to review the subject orders now or should wait until later for review. Upon this question, we urge that review now is both appropriate and necessary.

It has been recognized by this Court that final agency action warranting review can be found where "an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order." *Pepsico, Inc.* v. *Federal Trade Commission,* 472 F.2d 179, 187 (2d Cir. 1972), *cert. den.* 414 U.S. 876 (1973). See, also, *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *McCulloch* v. *Sociedad Nacional de Marineros,* 372 U.S. 10 (1963). We submit that the present case precisely fulfills the conditions established in *Pepsico.*

As we have demonstrated in Point I(B) of our main brief, the FPC has no jurisdiction over utilities' decisions to make or not make agreements to wheel power. Accordingly, since Niagara Mohawk's alleged "refusal" to agree in principle to wheel power for Massena's proposed utility is the matter in issue here,* it is clear that the present

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* In its order issued June 2, 1975, the FPC stated (at 56a):

> "Massena's argument is basically that Niagara is acting in an anti-competitive manner because it refuses to agree to

matter "is plainly beyond [the FPC's] jurisdiction as a matter of law."

Further, it is clear that the investigation here can result in no "valid order" of the FPC other than a dismissal on the merits or for lack of FPC jurisdiction. The FPC cannot compel wheeling (see our main brief, Point I (B)). Thus, the FPC must ultimately either dismiss Massena's allegations as unfounded or, perhaps, as discussed *infra*, having improperly prejudiced the antitrust action which Massena has threatened against Niagara, confess that Massena's allegations fall beyond the FPC's authority. Thus, there can and will be no "definitive" action by the FPC at the close of the investigation here. In every real and practical sense, then, the order *instituting* the investigation is the "final" order here.

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wheel PASNY power to Massena in the event that Massena establishes a municipal electric distribution system."

Again, in its order issued July 23, 1975 instituting the Investigation, the FPC stated (at 67a):

> "Massena's May 5, 1975 protest, petition, and motion, incorporated by reference in their application, contended that Niagara's rate filing was part of an interstate program and combination to unlawfully monopolize the electric utility industry. That contention is premised on Niagara's alleged refusal to enter into negotiations leading to a contract by which Niagara would wheel energy to Massena, thereby enabling Massena to establish a municipally owned and operated electric system." (Emphasis added.)

Thus, while Massena asserts in general terms that Niagara Mohawk is engaged in anti-competitive practices and a "combination to unlawfully monopolize the electric utility industry" (14a), the only specific fact alleged in support of such charges is Niagara Mohawk's alleged "refusal" to agree to wheel (see our main brief, at p. 5). The suggestion by the FPC's counsel to this Court (FPC brief, p. 23, fn. 18) that there may be something more behind Massena's charges than the alleged "refusal" to wheel is not supported by the record or by the FPC's prior statements herein.

Finally, we repeat, as stated in our main brief (p. 34), that the investigation here is a sham. Massena, on April 4, 1975, advised that it would seek redress of Niagara Mohawk's alleged refusal to wheel power for Massena in an antitrust lawsuit on the *Otter Tail* model against Niagara Mohawk "in an appropriate Federal District Court." (36a; see also FPC brief, p. 17, fn. 10). One full year later no such lawsuit has been commenced.

Meanwhile, as Massena admits (Massena brief, p. 8), the only step actually taken in the investigation here has been Massena's overbroad request for depositions and subpoenas (discussed at pages 13-16 of our main brief). Thus, the character of this investigation as the classic type of the fishing expedition against which Mr. Justice Holmes inveighed in the *American Tobacco* case (see our main brief, at page 33), has been shown.

Counsel for the FPC in this Court suggests (FPC brief, p. 19, fn. 14) that the investigation is not a sham and that the FPC has not merely yielded its authority to Massena's private use because,

> "While Massena's petition to intervene may have brought these alleged practices to the attention of the Commission, the Commission made the decision to investigate based on the evidence available, including Niagara's failure to deny Massena's allegation that it had refused to negotiate wheeling and the undisputed fact that Niagara did wheel for other customer owned utilities (73a)."

Counsel's suggestion cannot stand, however, in light of the motion to the FPC by FPC Staff Counsel to dismiss the investigation "without prejudice to Massena's right to renew its complaint to the extent that the outcome of Docket No.

E-9550 dictates." Said motion, a copy of which is annexed hereto as Appendix A, is *sub judice* before the FPC.*

Said motion states, in part:

> "4. In its February 27 motion [to defer the investigation in Docket E-9379 pending the outcome of Massena's application in Docket E-9550 for mandatory interconnection of facilities pursuant to Section 202 of the Act (see 144a-156a; also Niagara Mohawk's main brief at pp. 12-13], Massena states that if it prevails in Docket No. E-9550, it would then move to dismiss the investigation in Docket No. E-9379. Accordingly, Massena has requested to defer proceedings in Docket No. E-9379 pending resolution of the Section 202 proceeding in Docket No. E-9550 so as to avoid what may prove to be an unnecessary expenditure of efforts.
>
> "5. Recognizing the tactical advantage of Massena's proceeding initially under Section 202, Staff agrees that to concurrently pursue the investigation in Docket No. E-9379 would be an inefficient use of administrative process. Massena should be permitted to pursue what it believes to be the more efficacious alternative, especially as here where it has the burden of going forward with the evidence in a proceeding which may become moot. . . ." **

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* Subsequent to the preparation of this reply brief, Niagara Mohawk has been served with a copy of an FPC order issued April 8, 1976 granting said motion, together with a motion dated April 8, 1976 by the FPC to dismiss the Petition for Review in this Court. Niagara Mohawk will file a separate response to said motion and comment upon said order.

** The FPC here contends that if said motion is granted by the FPC, the matter before this Court will be mooted (FPC brief, p. 16, fn. 9). A dismissal of the investigation "without prejudice," as requested by Staff Counsel, will neither resolve nor eliminate the question of FPC jurisdiction which is before this Court, however. If the investigation is dismissed without prejudice to renewal at Massena's request, the jurisdictional issue presented here will merely be postponed for a period to serve Massena's convenience. Accordingly, Niagara Mohawk has requested in answer to Staff Counsel's motion that the FPC defer decision of said motion pending this Court's determination of the present matter.

2. *The Investigation Here Is Not Independent of the Con Ed-Niagara Transmission Agreement*

Massena, at page 10 of its brief, erroneously asserts:

> "[T]he Commission did not institute an investigation of the justness and reasonableness of the Con Ed-Niagara Mohawk contract, which investigation would have been conducted pursuant to Section 205 of the Federal Power Act. Rather, this general investigation was ordered pursuant to Section 206 of the Federal Power Act at Massena's request on rehearing (59a-65a) and the investigation is not tied to nor dependent upon the Con Ed-Niagara Mohawk agreement."

FPC counsel herein joins in this error, stating at pages 20-21 of the FPC brief:

> "Niagara mistakenly relies on the Commission's acceptance of the subject rate filing to support its contention that the Commission's investigation is a sham (Pet. Br. 16-19, 34-35). The Commission, however, is investigating alleged anti-competitive practices that affect rates and not this particular rate. If Massena's petitions are correct, these practices, by barring competition may render Niagara's rates unreasonably high." *

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* Counsel for the FPC illogically contends that a failure "to demonstrate any reasonable nexus between the activities challenged and the activities furthered" (FPC brief, pp. 22-23) is required to support a *denial* of a hearing by the FPC, but there is no requirement that a "reasonable nexus" be shown for a *grant* of a hearing. This "position" which counsel relies on as an attempt to distinguish *Northern California Power Agency* v. *FPC*, 514 F.2d 184 (D.C. Cir. 1975), *cert. den.*, —— U.S. —— (1975) and *City of Lafayette, La.* v. *SEC*, 454 F.2d 941 (D.C. Cir. 1971), *aff'd*, 411 U.S. 747 (1973), *reh. den.*, 412 U.S. 944 (1973) is contrary to the plain meaning of the Court's statement in *City of Lafayette*, 454 F.2d at 953:

> ". . . we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in

Massena and FPC counsel herein thus ignore the fact that the investigation was ordered *in Docket E-9379,* which concerned only the filing of the Con Ed-Niagara transmission agreement.

Massena and FPC counsel herein also ignore the fact that the FPC plainly stated in its order issued July 23, 1976 instituting the investigation (at 67a-68a):

> "Massena's May 5, 1975, protest, petition and motion incorporated by reference in their application, contended *that Niagara's rate filing* [of the Con Ed-Niagara transmission agreement] was part of an interstate program and combination to unlawfully monopolize the electric utility industry. That contention is premised on Niagara's alleged refusal to enter into negotiations leading to a contract by which Niagara would wheel energy to Massena, thereby enabling Massena to establish a municipally owned and operated electric system. Massena concludes that the revenues Niagara would receive *from the filing in the above-referenced docket* would be unlawfully used by the Company to strengthen its alleged monopolistic position over transmission in the Massena service area to the detriment of Massena.
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> * * * * *

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the record, that the intervenor's contentions are too insubstantial or barren . . . to meet the requirement of a reasonable nexus. . . . "

The requirement as referred to by the Court is, we submit, obviously a requirement that must be positively met for the grant of a hearing.

Further, contrary to FPC counsel's contention that the FPC reversed its finding that no "reasonable nexus" was shown here (at FPC brief, p. 23), the FPC's July 23, 1975 order (66a) does not expressly reverse the finding in the FPC's June 2, 1975 order (54a) that "a reasonable and sufficient nexus has not been established by Massena . . . " Thus, if said finding was reversed by implication, it could have been reversed only if a "reasonable nexus" is a necessary predicate to the grant of investigation in the July 23 order and may be presumed therefrom.

> "In view of the allegation raised by the Intervenor Massena herein, *that Niagara's rate filing* is part of an interstate program to unlawfully monopolize the electric utility industry and discriminate against the establishment by Massena of a municipal energy system, we find it is proper and appropriate in the public interest that the Application for Rehearing should be granted and an investigation pursuant to Section 206 of the Federal Power Act be instituted." (Emphasis added.)

Accordingly, it is clear that the investigation here was instituted by the FPC with specific reference to and dependent on the Con Ed-Niagara transmission agreement and Massena's claim relating thereto, not as any general or independent matter. Further, as is stated in our main brief at page 19, and uncontradicted by either Massena or the FPC, the Con Ed-Niagara transmission agreement could not have been "just and reasonable" and "free of undue preference and discrimination," as the FPC affirmatively found, if at the same time Niagara Mohawk was engaged *generally* in discriminating practices affecting and inflating the rates as to *all* of its transmission agreements.

Further, if the FPC *had* been given any reasonable basis by Massena's allegations to believe that all of Niagara Mohawk's transmission rates, and accordingly the Con Ed-Niagara transmission agreement rate, might have been inflated as alleged, the FPC, as Massena requested in its Protest and Petition (at 16a), could have chosen to reject the Con Ed-Niagara transmission agreement or postpone or condition acceptance thereof pending investigation of Massena's charges. Such a procedure is specifically provided for in Section 205(e) of the Act, 16 U.S.C. § 824d(e), which states:

"Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public

> utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Thus, had there been cause to do so, the FPC could have effectively preserved Massena's allegations with specific reference to the Con Ed-Niagara transmission agreement and could have shifted to Niagara Mohawk the burden of showing that its transmission rate therein was "just and reasonable." Because of the existence of this option, the Commission's actions are especially significant in affirmatively finding the Con Ed-Niagara transmission agreement "just and reasonable" and "indeed free of undue preference and discrimination," (56a) and in accepting and approving without qualification the filing of said rate (56a).

Further, the FPC's option under Section 205(e) of the Act totally distinguishes this case from *Roe* v. *Wade,* 410 U.S. 113 (1973), *reh. den.,* 410 U.S. 959 (1973), which the FPC incorrectly cites in its brief (p. 21, fn. 15) for the proposition that, "the recurring nature of these short term rate agreements prevents this [investigation] proceeding from becoming moot [upon the termination of the Con Ed-Niagara transmission agreement]." *Roe* concerned the constitutionality of the Texas criminal abortion laws. Thus, the Court (per Blackmun, J.) found that *Roe* presented an exceptional case and the Court stated, at 410 U.S. 125:

> " . . . when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and

> appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'"

Here, unlike *Roe,* Section 205(e) provides a specific mechanism which could have been used to keep the Con Ed-Niagara transmission agreement rate from "evading review," *had the FPC been given cause by Massena's charges to question said rate.**

3. *The FPC Has No Jurisdiction to Consider the Antitrust Effects of Utilities' Decisions to Make or Not Make Agreements to Wheel Power*

The FPC, relying principally on a misreading of *Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973), *reh. den.,* 412 U.S. 944 (1973), states in its brief (pages 17-18) that an investigation by the FPC of the antitrust effects of Niagara Mohawk's alleged "refusal" to wheel for Massena "will serve as a first line of defense against the anticompetitive activities of Niagara—if any are shown—by aborting those practices in their inception and obviating the necessity for a

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* In this regard, it must be noted that FPC counsel, at page 20 of the FPC brief, speaks of Massena's charges against Niagara Mohawk as if they were established fact. Counsel gives no reason for this treatment, which is unsupported by the record herein and contrary to the finding of the FPC in its order issued June 2, 1976 (56a):

> "Moreover, *without demonstrating substantial anti-competitive practices,* Massena has failed to indicate what possible harm it will experience as the result of the instant rate schedule filing." (Emphasis added.)

prolonged antitrust trial in district court." In so stating, the FPC ignores the conditions specifically stated in *Gulf States* (and discussed at pages 29-31 of our main brief) that the FPC has the responsibility to consider anti-competitive effects only as to "regulated aspects of interstate utility operations . . . ," 411 U.S. at 758-759, and only "in appropriate circumstances," *Id.* at 758. As stated in our main brief, neither of said conditions is fulfilled by the present case.

In *California* v. *FPC*, 369 U.S. 482 (1962), relied on by the FPC at page 17 of its brief, the Court considered the adverse effects when the FPC oversteps the bounds of its antitrust responsibility. There, the FPC approved an acquisition of assets, holding that "[A]ny lessening of competition is not substantial," despite the pendency in the courts of an antitrust action by the Federal Government challenging the stock acquisition which preceded the acquisition of assets. The Court stated, at 486, 490:

> "Section 7 of the Clayton Act—which prohibits stock acquisitions 'where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'—contains a proviso that 'Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission. . . .' The words 'transactions duly consummated pursuant to authority' given the Commission 'under any statutory provision vesting such power' in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in § 7 of the Clayton Act ' . . . it is not intended that . . . any . . . agency' mentioned 'shall be granted any authority or

powers which it does not already possess.' S. Rep. No. 1775, 81st Cong., 2d Sess., p. 7.

* * * * *

" . . . Other administrative agencies are authorized to enforce § 7 of the Clayton Act when it comes to certain classes of companies or persons; but the Federal Power Commission is not included in the list.

* * * * *

"Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. [Citation omitted.] The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. Moreover, as noted, the Commission in holding that 'any lessening of competition is not substantial' was in the domain of the Clayton Act, a domain which is entrusted to the court in which the antitrust suit was pending." (Footnote omitted.)

Here, an antitrust action in the District Court has been expressly threatened by Massena (36a). The proposed subject of said action is Niagara Mohawk's alleged refusal to agree to wheel power for Massena (36a). As demonstrated in our main brief (Point I(B)), the FPC has no responsibility for or authority as to wheeling.

Further, it must be noted that in the landmark case concerning wheeling agreements and the antitrust laws, *Otter Tail Power Co.* v. *U.S.*, 410 U.S. 366 (1973), *reh. den.*, 411 U.S. 910 (1973), the findings as to antitrust effect were made *by the District Court,* without reference to the FPC.

4. *There Is No Need for the FPC to Investigate to Determine the Extent of Its Jurisdiction Here*

The FPC erroneously contends (FPC brief, Point III) that it should be allowed to investigate so that it can determine whether it has jurisdiction here.

As Massena has stated (Massena brief, p. 23):

> "A hearing to determine the substantiality of the allegations of anti-competitive conduct will not supply additional bases for jurisdiction and is not needed. The jurisdiction of the Commission must be present prior to any hearing on the merits of the allegations."

Thus, we submit that Massena's allegations upon which the investigation here is based, assuming *arguendo* the truth of such allegations, show at most only a refusal by Niagara to enter into a transmission agreement and the effects thereof. Thus, since regulation of such a decision has been specifically withheld by Congress from the FPC (see our main brief, Point I(B)), *Massena's allegations themselves* affirmatively demonstrate that the FPC has no jurisdiction with respect thereto.

Further, the FPC, by its July 23, 1975 order instituting the investigation and by the subject orders denying Niagara Mohawk's motion to dismiss the investigation, has made an "initial" determination that it *has* jurisdiction herein. That determination is, we submit, clearly erroneous, and it is that determination which is the subject of the present review.

5. *The Niagara Project Contract Is Irrelevant to the Present Case*

In its brief, Massena argues at length in Points I and II that the contract (the "Niagara Project contract") filed as FPC Electric Rate Schedule No. 19 between Niagara Mohawk and the Power Authority of the State of New York ("PASNY") should be interpreted or amended by the FPC to provide for the transmission of PASNY power by Niagara Mohawk to the proposed Massena municipal utility.

The Niagara Project contract is not at issue in or relevant to the present case, however. The issue here is whether the FPC has jurisdiction for the investigation which it has instituted in its Docket E-9379, which concerned *only* the Con Ed-Niagara transmission agreement. Accordingly, Niagara Mohawk, without admitting or accepting any part of said arguments, does not at this time answer Massena's arguments as to the Niagara Project contract.

It should, however, be noted generally that Massena errs when, in connection with its Niagara Project contract argument, Massena, at pp. 15-17 of its brief, discusses railroad and telegraph company cases on the duties of a common carrier. Such cases have no relevance here because, as stated by the Supreme Court in *Otter Tail Power Co.* v. *U.S., supra,* at 373-74 (quoted in our main brief, at pp. 19-20):

> "As originally conceived, Part II [of the Federal Power Act] would have included a 'common carrier' provision making it 'the duty of every public utility to . . . transmit energy for any person upon reasonable request . . . ' In addition, it would have empowered the Federal Power Commission to order wheeling if

it found such action to be 'necessary or desirable in the public interest.' H.R. 5423, 7th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve 'the voluntary action of the utilities.' S. Rep. No. 621, 74th Cong., 1st Sess. 19."

6. *Niagara Mohawk Has Not Refused to Wheel Power for Massena*

As stated in our main brief (p. 26), Niagara Mohawk has not and could not have "refused" to wheel power for Massena.

Accordingly, Massena is incorrect when it states at page 2 of its brief:

> "It likewise cannot be contended that Petitioner Niagra Mohawk is proceeding in good faith in its dealings with Massena nor that Niagara Mohawk has evidenced anything other than an attitude of corporate arrogance and disdain toward Massena's continued attempts to negotiate a transmission agreement."

The fact is simply that no basis exists on which Niagara Mohawk could either "refuse" or "agree" at this time to wheel power for Massena. Any attempt to do so would be purely hypothetical.

Accordingly, as to the two questions posed by Massena at page 24 of its brief, we respond that Niagara Mohawk can neither "refuse" nor "agree" as requested in the first question, and we respond that the second question is not relevant to the present matter and that Niagara Mohawk will take such positions in other proceedings as may be appropriate therein.

Conclusion

For the reasons stated above and in our main brief, the subject orders should be reversed.

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

NIAGARA MOHAWK POWER CORPORATION

Docket Nos. E-9379 and E-9550

Answer of Commission Staff to Massena's Motion for Deferrel of Proceedings

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Motion of Commission Staff to Dismiss Proceedings Without Prejudice

On February 4, 1976, the Town of Massena, New York filed in Docket No. E-9550 an application for physical interconnection under Section 202(b) of the Federal Power Act together with a request that the proceedings in Docket No. E-9379 be deferred pending the outcome of Docket No. E-9550. Similarly, on February 27, 1976, Massena filed a motion for deferral of the proceedings in Docket No. E-9379 or in the alternative, for an extension of procedural dates. Pursuant to Section 1.12 of the Commission's Rules of Practice and Procedure, Commission Staff hereby answers that it opposes the motion to defer. Moreover, Commission Staff requests that the Commission dismiss the proceedings in Docket No. E-9379 without prejudice to Massena's right to renew its complaint to the extent that the outcome of Docket No. E-9550 dictates. In support therefore Staff shows as follows:

1. On April 14, 1975, Niagara Mohawk Power Corporation filed in Docket No. E-9379 a rate schedule providing for the transmission or wheeling of electric power from Rochester Gas and Electric Corporation to Consolidated Edison Company of New York, Inc. The Town of Massena, New York, whose residents presently receive electric service from Niagara at retail, filed a protest and petition to intervene and motion to reject claiming that Niagara's rate filing is part of an interstate program to unlawfully monopolize the electric utility industry and discriminate against the establishment by Massena of a municipal utility system. By order issued July 23, 1975, in Docket No. E-9379 the Commission instituted an investigation of the matter pursuant to Section 206 of the Federal Power Act. The hearing, initially set for December 16, 1976, has been extended on several occasions and is presently scheduled for May 3, 1976.

2. On December 2, 1975, Niagara filed a petition for review of the Commission's order issued September 25, 1975, denying Niagara's motion to dismiss the investigation and order denying rehearing issued November 13, 1975. *Niagara Mohawk Power Corporation* v. *F.P.C.*, No. 75-4263 (2d Cir.). On March 2, 1976, petitioner, Niagara, filed its brief on the merits contesting the Commission's jurisdiction to order the investigation as well as its jurisdiction to ultimately provide any meaningful relief to Massena.

3. The anti-competitive allegations raised by Massena in Docket No. E-9379, although sparked by the transmission agreement filed therein, are not necessarily confined to that transaction. As a matter of fact, that agreement terminated by its own terms on October 31, 1975. The proceedings in

Docket No. E-9379 are therefore more in the nature of a general complaint proceeding under Section 206 of the Act. Moreover, Massena has the burden of going forward with the evidence in this proceeding. More specifically, Massena must "specify the facts relied upon, anticompetitive practices challenged, and the requested relief which is within this Commission's authority to direct." See Order denying rehearing issued November 13, 1975, in Docket No. E-9379, *citing, Indiana & Michigan Electric Co.*, 49 FPC 1232 (1973).

4. In its February 27 motion, Massena states that if it prevails in Docket No. E-9550, it would then move to dismiss the investigation in Docket No. E-9379. Accordingly, Massena has requested to defer proceedings in Docket No. E-9379 pending resolution of the Section 202 proceeding in Docket No. E-9550 so as to avoid what may prove to be an unnecessary expenditure of efforts.

5. Recognizing the tactical advantage of Massena's proceeding initially under Section 202, Staff agrees that to concurrently pursue the investigation in Docket No. E-9379 would be an inefficient use of the administrative process. Massena should be permitted to pursue what it believes to be the more efficacious alternative, especially as here where it has the burden of going forward with the evidence in a proceeding which may become moot. On the other hand, to defer indefinitely a proceeding involving allegations of anticompetitiveness and discrimination may unduly prejudice Niagara's interest in defending its "name" in a timely fashion.

6. Massena would not be unduly prejudiced by dismissal of the proceedings in Docket No. E-9379. If upon the con-

clusion of Docket No. E-9550 Massena deemed it necessary to renew its allegations of anti-competitiveness and discrimination, Massena could then file a complaint pursuant to Section 206 of the Federal Power Act.

WHEREFORE, Commission Staff respectfully requests that the proceedings in Docket No. E-9379 be dismissed without prejudice to Massena's right to renew its complaint to the extent that the outcome of Docket No. E-9550 dictates.

Respectfully submitted,

/s/ JAMES T. MCMANUS
James T. McManus
Commission Staff Counsel

Washington, D. C.
March 11, 1976

Certificate of Service

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of §1.17 of the Rules of Practice and Procedure.

Dated at Washington, D. C., this 11th day of March, 1976.

/s/ JAMES T. MCMANUS
James T. McManus
Commission Staff Counsel

United States Court of Appeals
For the Second Circuit

Niagara Mohawk Power Commission,

Petitioner,

- V.-

Federal Power Commission,

Respondent,

Town of Massena, New York,

Intervenor

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF } ss.:

Thomas C. Reycraft, being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 668 Ely Avenue, in the County Borough of Westchester, State City of New York. On the 16th day of April, 1976, at 1 P. M. o'clock,

I served 2 copies of the Reply Brief of Petitioner Niagara Mohawk Power Corp.

in the above-entitled action on: each of the following parties

Drexel D. Journey, Esq.
Allan Abbott Tuttle, Esq. and
Allan M. Garten, Esq.
Federal Power Commission
Washington, D. C. 20426

Duncan Brown Weinberg & Palmer, Esqs.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

the attorney for the

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Thomas C. Reycraft

Sworn to before me this
16th day of April, 1976

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4503056
Qualified in Nassau County
Commission Expires March 30, 1977